No. 96-270

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

AMCHEM PRODUCTS, INC., ET AL.,
Petitioners,

v.

GEORGE WINDSOR, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF RESPONDENTS WHITE LUNG ASSOCIATION OF NEW JERSEY, ET AL.

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QUESTIONS PRESENTED

1. Did the complaint in this asbestos personal-injury class action satisfy (a) the amount-in-controversy requirement of 28 U.S.C. 1332, where the class representatives testified that they had sustained no damages and presently sought no monetary or other recovery, and (b) Article III's case-or-controversy requirement, where the simultaneously-filed class action settlement provided no relief for the claims pled in the complaint, but rather established a binding extra-judicial claims procedure to process *future* personal-injury claims if and when they accrue?

2. Was the court of appeals correct in holding that this class action—which purports to resolve the *future* asbestos personal-injury claims of millions of class members under the varying laws of all 50 states, and would enable the class members to opt out only *before* they contract an asbestos-related disease—failed to meet the typicality, adequacy of representation, predominance, and superiority requirements of Federal Rule of Civil Procedure 23?

PARTIES TO THE PROCEEDING

Petitioners have listed the parties below in the appendix to the petition for a writ of certiorari at 292a. Respondents who were appellants below and who appear in this Brief are the White Lung Association of New Jersey, the National Asbestos Victims Legal Action Organizing Committee, the Oil, Chemical, and Atomic Workers International Union, the Skilled Trades Association, Myles O'Malley, Marta Figueroa, Robert Fiore, Ron Maher, and Lynn Maher (in her own behalf and as next friend for her minor children, Jessica Marie Maher, Jamie Marion Maher, and Jennifer Megan Maher).

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STATEMENT OF THE CASE

A. The Class Action "Suit."

In mid-1991, the Judicial Panel on Multidistrict Litigation transferred all asbestos personal-injury cases pending in federal court to the Eastern District of Pennsylvania to explore settlement options. *In re Asbestos Prod. Liab. Litig.*, 771 F. Supp. 415, 416 (J.P.M.L. 1991). After efforts at settlement involving all asbestos defendants failed, petitioner Center for Claims Resolution ("CCR")—a consortium of 20 asbestos defendants—approached two plaintiffs' asbestos lawyers, Ronald L. Motley and Gene Locks, for the purpose of negotiating a settlement, *not* of the cases that the Panel had transferred, but of all asbestos claims against the CCR defendants that had not yet been filed, but might be filed in the future, in federal or state court.

By January 15, 1993, that settlement had been reached, and Motley and Locks filed the complaint in this case, seeking an opt-out class under Rule 23(b)(3). At the same time, CCR filed its answer, and all counsel signed and filed a Stipulation of Settlement. Shortly thereafter, the CCR defendants conceded that the case, involving the disparate claims of millions of class members under the laws of all 50 jurisdictions—some with serious diseases, some with relatively minor asbestos-related impairments, and the vast majority with no symptoms at all—could not be litigated as a class action. JA 131. Although nominally styled as a case brought by named plaintiffs against CCR, in the words of CCR's chief executive officer, CCR "picked" Motley and Locks for the purpose of negotiating a settlement, which would, in turn, become a friendly lawsuit the sole purpose of which was to substitute an extra-judicial claims procedure for the remedies available in the court system. JA 427.

The class—which numbers in the millions (Cert. App. 248a, 103a)—was defined to include all U.S. residents occupationally exposed to asbestos for whom CCR defendants

may now, or at any time in the future, bear legal liability, as well as all individuals residing with, or related to, such persons. JA 50-51. Specifically excluded are all individuals who had brought suit against one or more of the CCR defendants prior to January 15, 1993, the date that the complaint and settlement were filed.

The exclusion of previously-filed suits was critical to class counsel, who effectively opted-out their presently-injured clients from the class and settled their claims for $215 million in cash (including at least $70 million in attorney's fees), rather than subjecting those claimants to the class settlement's administrative scheme. JA 560. CCR agreed to these side-settlements, the most important of which were signed on the eve of the filing of the class action, only after it believed that the class action settlement would be consummated. JA 447, 667-68, 761. Not only did the side-deals pay class counsel's "present" clients far more than they could hope to obtain under the class action settlement (*see, e.g.*, Obj. Ex. O-170), but they paid cash for certain illnesses, such as many asbestos-related lung cancers, that, CCR concedes, would not qualify for any compensation under the class settlement. *See, e.g.*, JA 771.

The vast majority of the class members were so-called "exposure-only" plaintiffs—individuals who had been exposed to CCR asbestos-containing products, but who then suffered from no asbestos-related disease. Cert. App. 103a-105a. The class complaint alleged three bases for recovery of money damages for the exposure-only plaintiffs: negligent infliction of emotional distress, increased risk of a future condition, and medical monitoring. JA 18-20. The complaint did not request any of the relief agreed to in the simultaneously-filed class settlement, and none of the relief actually provided in that settlement corresponds to the damages nominally sought in the complaint.

Instead, the settlement established a procedure under which class members may file claims if they develop an asbestos-related illness. Under it, the CCR defendants themselves decide whether the claimant satisfies the settlement's strict medical criteria for compensation, with an appeal to

arbitrators appointed by the parties. JA 56-75. Among other things, those criteria exclude so-called "pleural cases"—involving lesions or thickening of the lining on the outside of the lung, but little or no physical impairment—which are compensable under the laws of most states. If medical eligibility is established, CCR itself, *without any independent review*, makes decisions on payment levels, within broad ranges, on more than 98% of all claims. JA 80-81. Within those ranges, CCR has complete discretion to make individual monetary awards, as long as certain averages are maintained, which themselves are vastly below historical levels.[1] Moreover, the awards are *not* adjusted for inflation, which is all the more significant because the class members are bound to the settlement in perpetuity, although each CCR defendant has an unbridled right to abandon the settlement after 10 years. JA 101.

After completing this process, claimants who meet the medical criteria may, in theory, seek arbitration or relief in the tort system (subject to numerous procedural requirements and no right to seek punitive damages) (JA 87-91), but fewer than 1% of eligible claimants may file in any one year. JA 109,

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[1] For instance, under the settlement all but 1% of non-malignant claimants are limited to between $2,500 and $30,000, with the average award as low as $5,800, *in CCR's sole discretion*. JA 81, 110. Historically, however, CCR's average payment to non-malignant claimants is $8,810, which *includes* pleural claimants, who get no cash recoveries under the class settlement. *See* JA 578. Some of the state-by-state discrepancies are even more dramatic. *See, e.g.*, JA 574-78 (in the tort system Minnesotans average $23,984, Marylanders average $12,170, New Yorkers average $16,421, South Carolinians average $18,327, all *including* pleural claimants). Discrepancies for other diseases are equally, if not more, striking. *Compare* JA 81, 110 (average qualifying claim under settlement for "other cancer" need not exceed $9,500), *with* JA 578 (historical CCR payment for "other cancer" $16,939, which *includes* all claims that would not meet the class settlement's medical criteria); *see also* JA 471, Affidavit of Larry Sartin of Oil, Chemical, and Atomic Workers' Int'l Union (historical tort recoveries of union members far below average permissible settlement recoveries).

174. Thus, even if just a small percentage of class members seek such relief, the wait will soon exceed 15 years. *See, e.g.*, JA 917.

Nominally, the settlement requires that claimants be paid within about nine months of the filing of a qualifying claim. JA 344, 385-86. However, payment is subject to strict yearly case-flow maximums, and if those levels are exceeded (JA 382, 436), which is likely in light of historical data, payments could be delayed for many years. *See* 3/3/94 Tr. at 52-54.

B. Proceedings Before The District Court.

The settlement was challenged in the district court as grossly unfair. *See generally* Brief Amicus Curiae of Asbestos Victims of America. The objectors included respondents herein—individual class members, a broad consortium of asbestos advocacy groups, and labor organizations, including the Oil, Chemical, and Atomic Workers International Union, whose 300,000 current and former members were heavily exposed to asbestos in the workplace. The objectors also argued that the settlement suffered from four fundamental legal impediments. First, they argued that this was a feigned case, not susceptible to resolution under Article III's case-or-controversy requirement, principally because the nominal plaintiffs never intended to pursue any of the relief listed in the complaint. This was made plain not only by the lack of any relation between the relief purportedly sought in the complaint and that obtained in the settlement, but also by the testimony of the named "exposure-only" plaintiffs, each of whom expressly renounced the claims in the complaint and disclaimed any desire for money damages because they had not sustained any asbestos-related injuries. As one named plaintiff put it, "I have nothing wrong with me. So therefore, I should not and will not seek any damages or actions." JA 686.

Second, objectors maintained that none of the exposure-only class members had the requisite $50,000 in controversy to establish diversity jurisdiction under 28 U.S.C. 1332, since the causes of action pled were not valid causes of action in most

jurisdictions. The lack of a good faith allegation of $50,000 in damages for each class member was buttressed by the named plaintiffs' testimony which, again, demonstrated that the complaint's damage allegations were a sham. *See* Cert. App. 62a-66a (Wellford, J., concurring).

Third, objectors maintained that the class notice was ineffective under Rule 23 and the due process clause because it was impossible to provide meaningful notice to millions of "future" class members to alert them to their opt-out rights. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-13 (1985). Objectors pointed out that the *uninjured* plaintiff class would have no reason to heed a notice because many class members knew nothing of their exposure, and that, even for those who did, it was fundamentally unfair to force them to decide whether to opt out before they knew the extent of their injuries or what their personal circumstances would be at the time they became ill.

With respect to the argument that formed the basis for the court of appeals' decision, objectors challenged class certification under Rule 23. They argued that it was impossible to meet Rule 23(a)(3)'s requirement that the claims of the representative plaintiffs be "typical" of the class, since no claims of the class representative could be said to be "typical" of any, let alone *all*, claims of future asbestos victims whose circumstances were unknown and unknowable. The objectors also contended that the case did not present common questions of law and fact under Rule 23(a)(2), and that any common questions did not predominate over the case's myriad individual variations under Rule 23(b)(3), including enormous choice-of-law difficulties in this nationwide diversity case.

Finally, the objectors contended that Rule 23(a)(4)'s adequacy of representation requirement had not been met. The settlement terms themselves indicated that the class representatives could not, with one set of lawyers, represent *all* the class members, some of whose claims were abrogated, or made virtually worthless, in order to enhance the position of other claimants. Similarly, the objectors pointed to class counsel's decision to benefit their "present" clients outside the

class, by obtaining the $215 million side-deal, instead of including them in the settlement.

The district court rejected each of respondents' arguments and approved the settlement. Cert. App. 88a-276a; JA 183-226. CCR then moved for an injunction that would bar all class members from suing the CCR defendants for asbestos-related injuries in federal or state court and require them to use the settlement's claims procedure to obtain compensation. At this point, certain class members who had been diagnosed with asbestos-related diseases *after* the end of the opt-out period, and who had never received the court-ordered notice of the class action, entered the case to argue against the injunction. *See, e.g.*, Dkt. No. 1161. On September 21, 1994, the district court granted the injunction (Cert. App. 67a), and respondents appealed that order under 28 U.S.C. 1292(a)(1), arguing that, because the district court lacked subject matter jurisdiction and the power to bind the absent class members under both Rule 23 and the due process clause, the injunction should be vacated.

C. The Decision of the Court of Appeals.

The court of appeals unanimously reversed in an opinion by Judge Edward M. Becker. The opinion began by describing the "most notabl[e]" aspect of the settlement—that generally it did not resolve the claims of those who had suffered injuries, but of those who had not (Cert. App. 17a-18a)—and by expressing "serious doubts as to the existence of the requisite jurisdictional amount, justiciability, adequacy of notice, and personal jurisdiction over the absent class members." Cert. App. 19a. In order to avoid ruling on these constitutional problems, the court held that "this class meets neither the [Rule] 23(a) requirements of typicality and adequacy of representation, nor the 23(b)(3) requirements of predominance and superiority." *Id.* The court rejected CCR's two related contentions—that Rule 23's certification criteria should be applied more liberally in a settlement context and that the court's review of the settlement terms may substitute for strict

application of the certification criteria to the claims pled in the complaint.

Judge Becker relied on the Third Circuit's recent decision in *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.* ("*GM Trucks*"), 55 F.3d 768, 799 (3d Cir.), *cert. denied*, 116 S. Ct. 88 (1995), which had concluded that neither the text nor the purpose of Rule 23 "authorize[d] separate, liberalized criteria for settlement classes." The court then explained that, in order to obtain certification of any class action, the district court must first find that Rule 23(a)'s numerosity, commonality, typicality, and adequacy of representation requirements are met, and then that the class falls within one of Rule 23(b)'s three subdivisions. Cert. App. 38a. The court initially examined whether common questions of law and fact exist (Rule 23(a)(2)) and whether such common questions "predominate over any questions affecting only individual [class] members" (Rule 23(b)(3)). It also discussed the large number of individual factual variations, such as differences in types of illness and smoking history, particularly regarding the "futures plaintiffs [who] share little in common, either with each other or with the presently injured class members." Cert. App. 41a. These factual differences created significant legal variations regarding causation, comparative fault, and the types of damages available to each class member. The problem was "compounded exponentially" by choice-of-law issues, which demanded application of the law of all 50 states on a range of issues, such as statutes of limitations, the viability of "exposure-only" causes of action, causation, and the like. *Id.*

Despite these difficulties, the court of appeals declined to rule that the class did not satisfy the commonality requirement of Rule 23(a)(2); however, it did conclude that the sole common issue of asbestos' harmfulness could not support a finding that common questions *predominated* over individual questions under Rule 23(b)(3). Cert. App. 43a-48a.

Turning to Rule 23(a)(4), the court ruled that "serious intra-class conflicts preclude this class from meeting the adequacy of representation requirement." Cert. App. 49a. The

court looked to the settlement itself, noting that it "makes numerous decisions on which the interests of different types of class members are at odds" and that such decisions "necessarily favor some claimants over others." *Id.* Thus, some claimants would obtain benefits on relatively favorable terms, while those with legally viable claims of asymptomatic pleural thickening, medical monitoring, or loss of consortium would receive no damages at all, and others, such as mesothelioma victims, would get far less than they would in the tort system. *Id.*

The "most salient conflict," the court concluded (*id.*), was between presently-injured and future class members; the former would want to maximize current benefits, while the latter would want protections, such as an adjustment for inflation or a back-end opt-out procedure (which allows the class member the option of going directly to court after an illness arises), neither of which the settlement provided. The lack of any such protections "thwarted the adequate representation of the disparate groups of plaintiffs." Cert. App. 52a.

The Third Circuit also held that typicality—which demands alignment between the claims of the named representatives and the absentees—was lacking because the same "hodgepodge" of claims and factual variations that plagued the commonality inquiry, and that defeated adequacy of representation, made it impossible for a class member's claim to be "typical" of that of any other class member. Cert. App. 53a. This was particularly true, the court held, because of the clash between presently-injured and future class members, but would also have been true if the class contained only "futures," since their circumstances are inherently unknowable and the types of diseases they might contract vary widely. *Id.*

Finally, relying mainly on fairness concerns about the settlement itself, the court found that class treatment was not "superior" to individual adjudication under Rule 23(b)(3). It noted, first, that class members had significant interests in controlling their own litigation because asbestos personal-injury claims, as opposed to the kinds of small claims for which Rule 23(b)(3) was intended (Cert. App. 55a), are judicially viable on their own. Second, the court relied on the inherent problems of

providing adequate notice in a "futures" class action. It noted that the class is composed primarily of uninjured persons, who would have little reason to pay attention to the class notice and who may not even be aware of their own asbestos exposure. *Id.* (citing testimony of two named plaintiffs who were unaware of their own exposure until their spouses became ill from asbestos).[2]

Thus, the court held, binding the class could not be deemed superior to individual actions brought when a class member develops an asbestos-related illness. The panel supported its notice concerns by explaining that the latency period for asbestos-related disease can be very long, and that one particularly horrible disease—mesothelioma—can be contracted through incidental exposures, as befell the wife of one of the named plaintiffs. JA 684. The court concluded that "we cannot conceive of how any class of this magnitude could be certified." Cert. App. 57a.

Judge Harry W. Wellford of the Sixth Circuit filed a concurrence, noting his agreement with Judge Becker's opinion, and further holding that the plaintiffs' "speculative," future injuries did not present an Article III case or controversy. He relied on the testimony of the class representatives which, as noted above, expressly renounced any present intention of seeking damages. *See* Cert. App. 62a-66a.

Judge Wellford's apprehension about the proper role of the courts thus struck the same chord as the panel's conclusions, albeit in a different key. While expressing concern over the large number of asbestos claims, the court of appeals made clear that the courts were not the place to seek mass-tort reform. Cert. App. 57a-58a. The court was thus determined to "leave legislative solutions to legislative channels." Cert.

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[2] Spouses and other household members are class members in two ways. First, they hold *future* loss-of-consortium claims if the exposed person with whom they live becomes ill (JA 49)(defining "Claim"). Second, they hold *future* personal-injury claims if *they* become ill as a result of contact with asbestos brought home on a worker's person or clothing (JA 50)(defining "Exposed Person").

App. 20a. "In doing so," the panel concluded, "we avoid a serious rend in the garment of the federal judiciary that would result from the Court, even with the noblest motives, exercising power that it lacks." *Id.*

SUMMARY OF ARGUMENT

I. Judging by the briefs of CCR and class counsel—CCR's nominal adversaries—the reader might conclude that this was an ordinary asbestos case that happened to be brought in the form of a federal-court class action. The difficulty with the settling parties' approach is that it overlooks the facts. Far from being routine or ordinary, the settlement stretches the boundaries of "case" or "controversy" and the limits of subject matter jurisdiction far beyond that allowed by any jurisdictional statute, procedural rule, or concept of due process, in order to bar *future* personal-injury claimants, who have no current cause of action, from using the tort system. In reality, the settlement is an extreme attempt to secure judicial legislation, clothed in the garb of a traditional lawsuit. "In short," as the Third Circuit observed, "what the district court did here might be ordered by a legislature, but should not have been ordered by a court." Cert. App. 20a.

The first and most alarming fact is that the defendants initiated this case. It began with an invitation from CCR to two leading plaintiffs' asbestos lawyers to discuss the possibility of a global settlement of both present and future claims. The present claims would be settled by the payment of $215 million in damages on a mass, or "inventory," basis, and the future claims would be settled by a class action. Settlements of the inventory claims were completed literally on the eve of the filing of the class action complaint. *See, e.g.*, JA 530. With respect to the future claims, a settlement was reached prior to the filing of a complaint. Then, as one named plaintiff testified, uninjured class representatives were recruited to "fit the profile" of the class (3d Cir. Jt. App. 1122), and, as planned, a settlement agreement, an answer, and a joint motion for class certification were filed with the complaint.

But the class settlement gave the future claimants a concededly very different and, in respondents' view, a far less advantageous deal than was given to victims who had filed their cases before the class complaint was filed, even though the lawyers for the class represented both groups of claimants. Moreover, although the complaint requested money damages for medical monitoring and for "injuries" such as fear of contracting asbestos-related disease, the simultaneously-filed settlement abandoned all of those requests and instead established a mandatory private dispute resolution system for all future asbestos claims against CCR. That system includes strict medical criteria which, in effect, establish a nationwide "applicable law," and it imposes limits on monetary recoveries that apply to all class members who do not opt out. This lack of congruence between the complaint and the settlement is confirmed by the fact that all of the named plaintiffs who testified said that they had never wanted the medical monitoring or the other relief sought in the complaint. And underscoring the fact that the class allegations were contrived, the class representatives testified not only that *they* wanted no present relief, but that exposure-only claimants seeking monetary recovery—including the millions of persons whose interests they purported to represent—should not get damages now because they were not sick from asbestos. JA 356-57, 695.

Even viewed on its own terms, the complaint creates jurisdictional problems that are insurmountable. It seeks relief under the laws of all 50 states, but those claims are legally foreclosed in many jurisdictions. *See* Cert. App. 60a-61a (Wellford, J., concurring). Those problems worsen significantly when the complaint is recast to bring it in line with the facts as they actually developed. Surely, a federal court could not "adjudicate" a lawsuit by exposure-only plaintiffs who sought only the court-ordered imposition on themselves and other exposure-only persons of an alternative dispute resolution system not authorized by any law. Under such circumstances, there would be no actual controversy between the named plaintiffs and the defendants; there could be no basis for finding that the named plaintiffs adequately represented people whose

needs and wishes were entirely unknown and, indeed, unknowable; and no one would suggest that the amount in controversy (if there were a controversy) even approached $50,000 for each of the named plaintiffs, let alone for each member of the class. Yet that is, in essence, what the settling parties seek here.

In fact, the situation presents a greater deviation from the norm than that. This suit is, in effect, an action for a declaratory judgment by the CCR defendants. It asks for a judicial stamp-of-approval on an agreement that will allow the CCR defendants to escape from the tort system into a private realm created by the settlement, with its own applicable law (JA 80), case flow procedures (JA 77-79), and limitations on monetary recovery (JA 110). Under it, the CCR defendants themselves process the claims and, within wide ranges, make unreviewable decisions on the amount that each eligible claimant will receive. JA 81. An affront to *Erie* and the principles of federalism on which it is built, this extra-judicial scheme is binding on all potential CCR claimants, unless they opted out in a narrow window before almost any of them knew enough to make an informed decision. Although formally a suit between real plaintiffs and defendants, this "case" is, in practical effect, a "reverse" declaratory judgment action, by which CCR has sought to adjust all of its unaccrued asbestos liabilities. As such, there is no Article III case or controversy. *See Keene Corp. v. Fiorelli*, 14 F.3d 726, 730-33 (2d Cir. 1993).

II. The settlement's fundamental jurisdictional problem—its attempt to impose a legislative solution on uninjured persons—is also at the root of its Rule 23 and due process defects. The Third Circuit avoided reaching respondents' "powerful" due process attack on the settlement (Cert. App. 31a), and held that Rule 23(b)(3)'s requirement that a class action be "superior" to individual adjudication could not be met in this "futures" class action. Indeed, notifying all persons with present asbestos claims against CCR about the settlement would have been difficult enough, but the problem was greatly exacerbated both because virtually all of the "future" class members had no current illness, and many,

including two class representatives, did not know, until after they were recruited by class counsel, that they had been exposed to asbestos, let alone to CCR's products. JA 368, 380. Even those who realized that they might be part of the class and who fully understood the voluminous notice materials, faced an almost impossible choice: The settlement provides relief for some, but not all, of the asbestos-related conditions for which plaintiffs had been recovering damages by settlement or judgment through the tort system. Not knowing what illness they might develop in the future, or what their personal circumstances might be at that time, the choice of staying in or opting out was no more rational than the flip of a coin. As the court of appeals noted, in addition to these notice problems, the lack of information about the "futures" class made adequate representation under Rule 23(a)(4) impossible, because the class representatives could not possibly advocate the interests of persons whose circumstances were not only unknown, but unknowable. Cert. App. 50a.

ARGUMENT

Respondents have grave concerns about the fairness of the settlement and the manner in which it was negotiated. But regardless of those concerns, and despite the allure of settlement as a method of unclogging dockets or alleviating an alleged social problem, there is a basic flaw in petitioners' efforts: Petitioners have gone to the wrong place to seek an end to what they apparently believe is their long asbestos nightmare. There is another place—a proper place—where CCR might obtain the result it sought in the district court. Congress has the power, but not always the political will, to mandate prospective solutions to perceived problems such as those sought to be avoided by the settlement here. Because the district court acted in contravention of the limited powers of the federal judiciary, and of the Rule 23 rights of persons who know little of what has occurred here, the decision of the court of appeals should be affirmed.

In the pages that follow, respondents focus initially on two reasons why the district court did not have subject-matter jurisdiction: the failure to satisfy 28 U.S.C. 1332's amount-in-controversy requirement and the lack of an Article III "case" or "controversy." We then turn to Rule 23 and explain that the court of appeals' decision was correct, concentrating on the Rule's "superiority" and "adequacy of representation" requirements.

I. THE RULING BELOW SHOULD BE AFFIRMED BECAUSE THE DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION.

The Third Circuit expressed "serious doubts as to the existence of the requisite jurisdictional amount, justiciability, adequacy of notice, and personal jurisdiction over the absent class members" (Cert. App. 19a), but rested its decision solely on Rule 23 grounds. Like concurring Judge Wellford, this Court should first consider the question of subject-matter jurisdiction because it has an obligation to "satisfy itself not only of its own jurisdiction but also that of the lower courts in a cause under review. ... [I]f the record discloses that the lower court was without jurisdiction this court will notice the defect, [even where] the parties make no contention concerning it." *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986)(citation omitted). In such a case, this Court has "jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." *Id.* (citation omitted).

The Court's duty to resolve the jurisdictional questions is of great significance here because of the district court's injunction, which, for more than two years, has barred every class member from maintaining a personal-injury suit against any of the 20 defendants, making it difficult, if not impossible, to challenge jurisdiction by collateral attack. Therefore, if the Court were to remand this case without considering subject-matter jurisdiction, the class members would continue to be

burdened by a potentially unlawful anti-suit injunction until the jurisdictional issues were resolved.

A. Section 1332's Amount-In-Controversy Requirement Was Not Satisfied.

When class certification is sought under Rule 23(b)(3), the representative plaintiffs must show that the claims of each member of the class individually exceed the jurisdictional amount. *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973). If the plaintiffs' jurisdictional allegations have been made in good faith, "[i]t must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal." *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 289 (1938).

The complaint alleges that the exposure-only named plaintiffs—Robert Georgine, Ambrose Vogt, Ty Annas, and Timothy Murphy—and every one of the millions of uninjured absent class members they purport to represent, are entitled to recover more than $50,000 on two similar claims of negligent infliction of emotional distress and enhanced risk of future condition (hereafter "fear claims"), as well as on a claim for medical monitoring. They make this allegation even though, by their own admission, they have not suffered any asbestos-related disease, nor do their x-rays show any asbestos-related abnormality, such as pleural plaques. *See, e.g.*, Complaint, ¶ 6, JA 6-7. Because none of the named plaintiffs, nor the exposure-only class members whom they purport to represent, was, at the time the suit was filed, seeking *any* money damages from the CCR defendants, they did not properly invoke the district court's jurisdiction under 28 U.S.C. 1332.

1. The Testimonial Evidence Demonstrates That Jurisdiction Was Lacking Over The Exposure-Only Claims. This Court has demanded that, at least when "challenged by his adversary in any appropriate manner," the party claiming the requisite amount in controversy must meet the challenge with "competent proof" by a "preponderance of evidence." *See McNutt v. GM Acceptance Corp.*, 298 U.S. 178, 189 (1936).

Far from providing any such proof, the representative plaintiffs' own testimony establishes that the amount-in-controversy requirement has not been met. *See* 1 *Moore's Federal Practice* ¶ 0.92[4] & cases cited therein, p. 855 (2d ed. 1994)(depositions and other oral testimony constitute appropriate evidence on amount-in-controversy questions). We now review key portions of the testimony of each exposure-only named plaintiff.[3]

Lead plaintiff Robert Georgine testified in court that he was not seeking money damages from the defendants then, nor at the time that he became a class representative (JA 749-50), because "I'm not impaired, and I have no damage that I know of that's caused by asbestos." JA 755, App. 1a; see also JA 449-50, App. 1a (making same point at deposition). When asked about the specific claims for relief, Mr. Georgine said that he had never suffered any emotional distress or other psychological injury from his asbestos exposure or needed any medical monitoring. JA 450, App. 1a-2a.

Plaintiff Vogt testified repeatedly that he had never sought any money damages and did not believe that the petitioners owed him any money because he was not sick. JA 395, 398, 678, App. 2a-3a.

Ty Annas' testimony was, if anything, more emphatic. Under questioning by his own attorney, he related his wife's death from mesothelioma in July 1992, and explained:

> I have nothing wrong with me. So therefore, I should not and will not seek any damages or actions. If my wife's breathing had not deteriorated, there would never had been a case [by her] against the asbestos companies.

JA 686, App. 3a. And on cross-examination, Mr. Annas bolstered his prior testimony (JA 691, App. 3a-4a):

[3] For convenience, the named plaintiffs' testimony relevant to subject matter jurisdiction is contained in an appendix to this Brief ("App.").

> Q: At deposition you testified that as of January 15, 1993 that you hadn't authorized anybody to sue for money for yourself because of your asbestos exposure, is that right?
> A: That's right.
> Q: And that is correct today?
> A: Yes, sir.[4]

Finally, plaintiff Timothy Murphy testified repeatedly that, since he was not injured, he was not seeking money damages from the CCR defendants. After receiving a medical report stating that he had no asbestos-related injuries, "[i]t never crossed [his] mind" to sue anyone, but he was recruited as a named plaintiff after an attorney told him that he "fit the profile of someone who was occupationally exposed to asbestos for

[4] In addition, Mr. Annas testified that, as a class representative, he had no intention of seeking money damages for anyone other than those who have asbestos-related physical impairments, making it clear that neither he, nor the class members that he seeks to represent, had any current money damages claim for emotional distress or medical monitoring (JA 694, App. 4a):

> I don't believe if there is [sic] impairment that anyone needs to be trying to collect money. ... People that are not impaired [who are trying to collect money] are exactly like those on the welfare system. ...

Mr. Annas continued (JA 694-95, App. 4a):

> Q: — you then believe that people who have pleural plaques should receive no compensation whatsoever, and that was your intent in entering into this agreement, correct? ... [objection overruled]...
> A: If they are not impaired.
> Q: If they're not impaired they should receive no compensation whatsoever?
> A: That's my feelings.

See also JA 357 (representative plaintiff Anna Baumgartner testifying that unimpaired individuals should not be compensated by anyone).

over a long period of time and that I could help him [the attorney] in their litigation." 3d Cir. Jt. App. 1122-23, App. 6a. Mr. Murphy testified that he had no idea that the complaint purported to seek money damages on his behalf, that the CCR defendants did not owe him anything, and that he was not claiming money damages or injuries of any kind and would only do so if he contracted an asbestos-related disease. 3d Cir. Jt. App. 1124-25, App. 6a-7a; *see also* Raver Dep., JA 375-76, App. 7a (named plaintiff who "didn't want any money" from CCR before suit was filed and "still do[esn't] want any money").

The foregoing testimony demonstrates that none of the representative plaintiffs wanted any recovery from the CCR defendants on the date that the complaint was filed. We recognize that a negotiated settlement that results in a recovery of less than the jurisdictional amount does not, by itself, defeat jurisdiction. *See* 1 *Moore's Federal Practice* ¶ 0.91[3], p. 824 (2d ed. 1994). Nor does the fact that the complaint relies on non-specific claims of unliquidated damages to meet the amount-in-controversy requirement warrant dismissal, as long as such claims are not implausible or lacking in good faith. But here, where the exposure-only claims were concededly pled solely as the vehicle for establishing a future claims procedure, and those claims were abandoned as part of a settlement that provided no current money damages, those facts are highly probative, if not dispositive, of a lack of jurisdiction. *Cf. Jones v. Knox Exploration Corp.*, 2 F.3d 181, 183 (6th Cir. 1993)(case must be dismissed where plaintiff concedes that amount in controversy is for less than jurisdictional amount); *see also Tongkook America, Inc. v. Shipton Sportswear Co.*, 14 F.3d 781 (2d Cir. 1994).

At bottom, if the amount-in-controversy requirement is to mean anything at all, a plaintiff must at least desire some of the relief requested in the complaint at the time the complaint is filed. Here, the complaint is a stunning example of parties—or more properly put, the CCR defendants and the plaintiffs' attorneys—colluding to establish jurisdiction under § 1332. *See St. Paul Mercury*, 303 U.S. at 290. Despite the allegations in

the complaint, every named exposure-only plaintiff did not want any recovery for negligent infliction of emotional distress, increased risk of a future condition, medical monitoring, or any other current asbestos-related injury.

Indeed, CCR conceded the dispositive factual issue below: "[A]lthough some of the named [exposure-only] plaintiffs had not incurred monetary loss at the time the complaint was filed, they testified that they were seeking relief in the form of the comprehensive, insurance-like benefits of the settlement...." CCR 3d Cir. Br. 20.[5] This is the clearest admission of what this case is *not* about: recovering money damages now. Indeed, if anything, it is a significant understatement since *all*, not just "some," of the exposure-only named plaintiffs had not yet incurred any monetary loss and, therefore, sought no money damages.

CCR seeks to establish the requisite jurisdictional amount by relying on the purported *future* value of the settlement as a whole to those who *may* benefit from it, *not* on the present value of each of the class members' present claims for relief. But it has been "well settled" for over a century that the amount in controversy may not include any "contingent loss either one of the parties may sustain by the probative effect of the judgment, however certain it may be that such loss will occur." *New England Mortgage Security Co. v. Gay*, 145 U.S. 123, 130 (1892). Rather, it is the value of the claims in the complaint that control, *St. Paul Mercury*, 303 U.S. at 288-89, and, therefore, the plaintiffs' testimony—which repudiates those claims—negates jurisdiction in this case. The settling parties' contention that the plaintiffs made good-faith allegations for more than the jurisdictional amount fails, and, on this basis alone, the district court should have dismissed the complaint. *Id.* at 289.

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[5] *See also* CCR 3d Cir. Br. 65 (CCR concedes that exposure-only class representatives "are not seeking and will not receive any money damages at this time, but instead will receive the insurance-like package of benefits...").

2. The Causes of Action Pled Do Not Establish Jurisdiction Under § 1332. The named plaintiffs' testimony—that only individuals with bona fide asbestos-related injuries, not mere asbestos exposure, should obtain compensation—is consistent with the applicable substantive law in most jurisdictions. The great weight of authority rejects the exposure-only plaintiffs' causes of action, in the absence of a physical injury.[6] Therefore, even if the plaintiffs had never conceded that they did not want damages, the exposure-only claims had, for the most part, no legal basis, and thus would not satisfy the amount-in-controversy requirement. Because fear of disease from exposure to asbestos, or harm from the future risk of a product alone, is not actionable, neither can form the basis of a good-faith claim for damages, let alone support a claim for more than $50,000 for each member of the class.

The district court held that even where no cause of action exists, it "must still be counted for jurisdictional purposes." JA 209. But there is no authority for that proposition, which is not surprising, since a plaintiff cannot possibly plead in "good faith" a claim foreclosed by applicable substantive law. To the contrary, consistent with this Court's view that it is sometimes necessary to decide whether a cause of action exists to determine whether jurisdiction exists, *Land v. Dollar*, 330 U.S.

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[6] *See, e.g., Ball v. Joy Technologies, Inc.*, 958 F.2d 36, 39 (4th Cir.)(rejecting exposure-only causes of action under West Virginia and Virginia law on basis of general American tort principles), *cert. denied*, 112 S. Ct. 876 (1992); *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir.)("subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law"), *cert. denied*, 474 U.S. 864 (1985); *Deleski v. Raymark Indus., Inc.*, 819 F.2d 377, 380-81 (3d Cir. 1987)(no damages allowed for fear or risk of asbestos-related injury in absence of current physical harm); *Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996); *see also Bowling v. Pfizer*, 143 F.R.D. 141, 162 (S.D. Ohio 1992)(reviewing cases in numerous jurisdictions where courts refuse to recognize claim for fear of product failure in the absence of physical harm).

731, 735, 739 (1947), the courts have repeatedly held that allegations that are not actionable under governing law do *not* count for jurisdictional purposes.[7]

Moreover, under this Court's decision in *Zahn*, *every* class member must have the requisite amount in controversy. 414 U.S. at 300. To make that determination, *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 814-23 (1985), requires that each class member's claim be assessed under the law of a jurisdiction with which he or she has had some contact relevant to the claims for relief. Thus, as a prerequisite to establishing jurisdiction over the entire class, the plaintiffs would have to show that at least one exposure-only cause of action is valid in every state, not merely, as CCR states (CCR Br. 7 n.3), that *some* causes of action exist in *some* jurisdictions.[8]

Further, even if exposure-only causes of action were cognizable in every jurisdiction, the allegations of the absent class members here would still be insufficient. As noted earlier, under this Court's decision in *McNutt*, once the complaint's amount-in-controversy allegations are challenged,

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[7] *See, e.g., Larkin v. Brown*, 41 F.3d 387, 389 (8th Cir. 1994); *Packard v. Provident Bank*, 994 F.2d 1039 (3rd Cir.)(in class action, because compensatory claims were below jurisdictional amount, and Pennsylvania law would not recognize punitive damage claims under relevant circumstances, amount-in-controversy requirement was not satisfied), *cert. denied*, 114 S. Ct. 440 (1993); *Morris v. Hotel Riviera, Inc.*, 704 F.2d 1113, 1115 (9th Cir. 1983)(because there was no cause of action, jurisdictional amount was not met); *Kahal v. J.W. Wilson & Associates, Inc.*, 673 F.2d 547, 548-49 (D.C. Cir. 1982).

[8] Even the cases upon which CCR relies would not establish a cause of action for a large proportion, if not all, of the class members. *See, e.g., Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795 (Cal. 1993)(cited by CCR as establishing fear-of-cancer cause of action, but actually holding that such claim may generally go forward only if can be shown more likely than not that cancer will develop from exposure); *Hansen v. Mountain Fuel Supply*, 858 P.2d 970 (Utah 1993)(cited by CCR as establishing medical monitoring cause of action, but failing to point out that plaintiff must show that monitoring will alter course of the disease).

the plaintiff must come forward with specific facts to support jurisdiction. *See also, e.g., NLFC, Inc. v. Devcom Mid-America, Inc.*, 45 F.3d 231, 237 (7th Cir. 1995); *In re School Asbestos Litig.*, 921 F.2d 1310, 1316 (3d Cir. 1990), *cert. denied*, 499 U.S. 476 (1991); *Amen v. City of Dearborn*, 532 F.2d 554, 560 (6th Cir. 1976). However, having pled *no* facts nor presented *any* evidence on the emotional distress suffered by the class members at the hands of the CCR defendants, or the level of fear of disease suffered by the class, *see NLFC*, 45 F.3d at 237, class counsel was in no position to make a *good-faith* allegation that these claims exceeded the jurisdictional amount. Consistent with *McNutt*, the lower courts require dismissal of diversity claims for emotional distress and pain and suffering, when, as here, they are conclusory, without evidentiary support, or unaccompanied by claims of significant liquidated damages.[9]

Common sense confirms why class counsel were unable to present any plausible evidence regarding the emotional distress of the class. The exposure-only class, like its four representative plaintiffs whose testimony is discussed above, is composed of persons who are not currently afflicted with disease. Even assuming that each class member knows that he or she has been exposed to asbestos, it is implausible to suggest that each of them—consisting of everyone in the United States who has been occupationally exposed to CCR asbestos, plus their spouses, relatives, and other household members—is currently suffering from non-physical harm in an amount exceeding $50,000. Rather, many absent class members, despite knowledge of their asbestos exposure, do not suffer from emotional distress or any other present harm. Indeed, the only absent class members to address the complaint's allegations of emotional distress expressly renounced those allegations

[9] *See, e.g., Larkin*, 41 F.3d at 388; *Rosenboro v. Kim*, 994 F.2d 13, 17 (D.C. Cir. 1993); *Christensen v. Northwest Airlines, Inc.*, 633 F.2d 529, 530-31 & n.3 (9th Cir. 1980); *Gill v. Allstate Ins. Co.*, 458 F.2d 577, 579 (6th Cir. 1972); *Nelson v. Keefer*, 451 F.2d 289, 296 (3d Cir. 1971).

under oath. *See* JA 137 (exposure-only class member suffering no emotional distress); JA 139 (same).[10]

Moreover, the Court should not indulge the fantastic presumption that all of the class members are aware of, let alone suffer emotional distress from, their asbestos exposure. As the Third Circuit noted (Cert. App. 55a), large numbers of class members know little or nothing of their occupational exposure to asbestos, an airborne toxin; therefore, they cannot possibly suffer any present emotional distress. *See, e.g.*, Winbun Dep., JA 368 (did not know anything about asbestos exposure until husband's mesothelioma revealed on autopsy, and, as far as she knew, husband had no knowledge either). Indeed, it is precisely because the class consists largely of uninjured and/or unknowing class members that the complaint is bereft of *any* facts specifying the pain and suffering or emotional harm suffered by the class. See JA 5, 6-7, 8-10, 16, 18, 19.

Perhaps recognizing that the fear claims were a wholly implausible basis for jurisdiction, the district court held that the claims for medical monitoring met the $50,000 requirement. But even if those claims were legally valid in all 50 states, that would not overcome the fact that each plaintiff who was questioned about medical monitoring indicated that he had no such damages or disclaimed any intention to seek such relief. *See* JA 370, 375-76, 393-94, 679-80, 3d Cir Jt. App. 1129, App. 5a, 6a, 7a-8a.

To be sure, unlike their other claims, which generally have no legal basis, the absent class' "claim" for medical monitoring, if it had been alleged in good faith, might be

[10] The same is true for the named plaintiffs. Mr. Annas testified that he had never instructed a lawyer to seek compensation for mental anguish (JA 421, App. 5a), even though the complaint purports to do that on his behalf. *See* JA 18. Mr. Murphy testified that he had never sought payment from the defendants for mental anguish or distress caused by his exposure to asbestos. 3d Cir. Jt. App. 1123, App. 6a. Mr. Georgine stated that he has never suffered from any psychological problems or emotional distress from his asbestos exposure. JA 450, App. 2a.

cognizable for some class members. *See Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 852 (3d Cir. 1990), *cert. denied*, 499 U.S. 961 (1991). *But see Fried v. Sungard Recovery Servs. Inc.*, 936 F. Supp. 310, 311 (E.D. Pa 1996). However, in this nationwide class action it would be necessary to show that medical monitoring is cognizable as a general matter, and in some jurisdictions that claim is foreclosed for exposure-only plaintiffs. *See, e.g., Ball*, 958 F.2d at 39 (no medical monitoring cause of action under West Virginia and Virginia law).

And even if one indulges in the unwarranted assumption that each class member needs to undergo medical monitoring and that medical monitoring is cognizable in all jurisdictions, the unrebutted evidence shows that the claim would entitle each class member to no more than an initial pulmonary function test, physical exam, patient history, and chest x-ray, valued at no more than $500, with annual chest x-rays thereafter. *See* Aff. of Dr. Thomas Lee Kurt, ¶¶ 4-5, JA 135. Thus, while the monitoring costs might amount to several thousand dollars over a particular class member's lifetime (discounted to present value), medical monitoring is the kind of small, liquidated claim that does not suffice to meet the $50,000 jurisdictional-amount requirement.[11]

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[11] *See Rosenboro*, 994 F.2d 13; *Nelson*, 451 F.2d at 297. Recognizing that the medical monitoring claim fell far short of the $50,000 line, CCR claimed for the first time in its Third Circuit brief that the claim could be aggregated as a common, undivided right to "research and other medical activities." CCR 3d Cir. Br. 61. But after respondents pointed out that CCR's argument was an end-run around this Court's anti-aggregation decisions in *Zahn* and *Snyder v. Harris*, 394 U.S. 332 (1969), and was belied by the complaint, which asked for individual medical-monitoring damages based on "each and every Defendant[s']" failure to warn each plaintiff (JA 19), CCR conceded at oral argument that no such aggregation was pled. 3d Cir Arg. Tr. at 218. Indeed, the case law generally affirms that a "claim for medical surveillance is simply a claim for future damages." *Ball*, 958 F.2d at 39; *see also Cook v. Rockwell Int'l Corp.*, 151 F.R.D. 378, 387 (D. Colo. (continued...)

CCR did not dispute below that the compensatory aspect of a valid medical monitoring claim is only a small fraction of $50,000, but argued that an award of punitive damages is not foreclosed, citing cases in which plaintiffs have *asserted* such claims, but citing no case in which punitive damages actually have been *awarded* incident to a medical monitoring judgment. This Court should reject the incredible notion that each class member, in every jurisdiction (even in those that have rejected the claim entirely), has pled a good-faith medical monitoring punitive damages claim worth more than $50,000. *Accord Sellers v. O'Connell*, 701 F.2d 575, 579 (6th Cir. 1983)(disregarding punitive damages allegation to augment amount in controversy because "appellant has cited no case" in which punitive damages were awarded under relevant circumstances). That would be quite a presumption in any case, but especially here where the named plaintiffs specifically stated that they had never sought, and did not want, medical monitoring or any damages at all, let alone punitive damages.[12]

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[11](...continued)
1993)("many decisions classify medical monitoring costs as an item of damage," citing cases).

[12] In finding jurisdiction, the district court erroneously relied on punitive damages awards in cases involving asbestos disease claims. JA 213. Those cases are irrelevant here, because punitive damages have *never* been awarded in an exposure-only case, where there generally is no cause of action at all. In addition, punitive awards are unavailable to class members in states which do not permit such awards under any circumstances. *See* Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 Vill. L. Rev. 363, 367 & n.15, 369 n.30 (1994)(reviewing law in five states where punitive damages are generally prohibited). Even in jurisdictions where punitive damages are available in some cases, the court must conduct an inquiry into whether, as a matter of each state's law, class members would have a plausible punitive damages claim on the particular facts alleged in the complaint. *See, e.g., Missouri v. Western Surety Co.*, 51 F.3d 170, 174-75 (8th Cir. 1995); *Larkin*, 41 F.3d at 389; *Packard*, 994 F.2d at 1046-50; *Givens v. W.T. Grant Co.*, 457 F.2d 612, 614 (2d Cir. 1972).

Finally, the notion that the plaintiff class can rely on unsubstantiated claims of punitive damages—whether as adjuncts to the medical monitoring claim or to the fear claims—is at odds with the Congressionally created scheme. Congress enacted § 1332's monetary limits to ensure that only some diversity cases would come to federal court. It has repeatedly raised the minimum jurisdictional amount—most recently to $75,000, Pub. L. 104-317, § 205, 110 Stat. 3850 (1996)—so that its original purposes would not be undermined. *See* H.R. Rep. No. 889, 100th Cong., 2d Sess. 45, *reprinted in* 1988 U.S.C.C.A.N. 6005-06. This policy should not, of course, be "thwarted by the simple expedient of inflating the complaint's *ad damnum* clause." *Nelson*, 451 F.2d at 294. But if, as CCR maintained below, one can gain entry to the federal courthouse simply by adding a claim for punitive damages in any case, then Congress' periodic reevaluation of § 1332 would be for naught. In sum, even if one were to ignore the plaintiffs' testimony, the class claims do not suffice to establish jurisdiction under § 1332.[13]

[13] A few courts have held that the supplemental jurisdiction statute, 28 U.S.C. 1367, overrules *Zahn* and the requirement that each absent class member have the requisite amount in controversy. *See In re Abbott Labs.*, 51 F.3d 524 (5th Cir. 1995). That is a decidedly minority view, *see id.* at 528 n.8 (collecting cases), and is at odds with § 1367's language and purposes, as its drafters have noted. *See* Mengler, Burbank, & Rowe, *Congress Accepts Supreme Court's Invitation to Codify Supplemental Jurisdiction*, 74 Judicature 213, 214-15 (1991); *see also* H.R. Rep. No. 734, 101st Cong., 2d Sess. 29, *reprinted in* 1990 U.S.C.C.A.N. 6879 (indicating that *Zahn* remains good law). In any event, the Court need not reach this question here because, as explained above, none of the named plaintiffs have the requisite amount in controversy, a requirement that remains regardless of the reach of § 1367. *See Snyder v. Harris*, 394 U.S. 332.

B. The Complaint And Simultaneously-Filed Settlement Did Not Present An Article III Case Or Controversy.

The district court's exercise of jurisdiction was also inconsistent with Article III's case-or-controversy requirement, particularly the prohibition against feigned or collusive cases. Under the proposed settlement, all the claims alleged in the simultaneously-filed complaint were extinguished in favor of an alternative dispute system that will resolve asbestos claims if and when a class member manifests certain symptoms. Class members have not yet sustained (and likely will never sustain) such future injuries, and all parties concede that they have no standing to assert them at this time. *See, e.g., Whitmore v. Arkansas*, 495 U.S. 149, 158 (1990); *City of Los Angeles v. Lyons*, 461 U.S. 95, 101-02 (1983). In short, the absence of any legal nexus between the claims purportedly sought by the exposure-only class, and the future "relief" agreed to on their behalf, shows that there never was a case or controversy to be decided by the district court.

The case-or-controversy requirement "limit[s] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through judicial process." *Flast v. Cohen*, 392 U.S. 83, 95 (1968). The Article III problem arose initially from the fact that this suit, from its very inception, concerned "adversaries" who had an identical goal in mind. When both parties desire the same result, there is no case or controversy. *Moore v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 47, 48 (1971). In *Moore*, the plaintiffs brought an action asking for a judicial determination that a state anti-busing statute was unconstitutional. Because the state's Attorney General agreed, the Court found there was no case or controversy and dismissed the action. Similarly, here, the record demonstrates that the settling parties agreed before the case was filed that the fear and medical monitoring claims alleged by the exposure-only class were to serve only as a jurisdictional gimmick to open the door to the federal courthouse. Once inside, the settling parties

would then ask for the court's blessing on their agreement to resolve future tort claims for hundreds of thousands of persons, wholly outside the court system. This collusive effort at invoking federal jurisdiction should have been rejected by the district court. *See also United States v. Johnson*, 319 U.S. 302 (1943); *Muskrat v. United States*, 219 U.S. 346 (1911).

The district court acknowledged that there is no case or controversy "if two litigants commence a suit with the same goals in mind," but that a "different case arises when litigants *begin* a suit as adversaries." JA 218 (quoting *Pennsylvania Ass'n for Retarded Children v. Pennsylvania*, 343 F. Supp. 279, 290 (E.D. Pa. 1972)). But even this language would negate jurisdiction here, and so the court relied not on the state of affairs when the case commenced, but on an assumption that, at some point prior to the filing of the suit, there had been the requisite adversity. At that time, the court speculated, the interests of the plaintiffs and CCR were in opposition because that had been the case for *other* asbestos victims "throughout the twenty-year history of asbestos litigation." JA 218.

But a case or controversy cannot be supplied by prior adversity between the same, let alone other, parties arising some time before the filing of the case, which had surely been true in *Moore*. Nor can that adversity be supplied simply by reference to a formal complaint. Instead, Article III compels the Court to look beyond the pleadings to the actual state of affairs when the case is filed in deciding whether the parties' interests are sufficiently adverse:

> [W]e are not bound to accept as true all that is alleged on the face of the complaint and admitted, technically, by demurrer, any more than the Court is bound by stipulation of the parties. [citation omitted] ... Formal agreement between parties that collides with plausibility is too fragile a foundation for indulging in ... adjudication.

Poe v. Ullman, 367 U.S. 497, 501 (1961). Here, the complaint alleges a feigned controversy with respect to the fear and

medical monitoring claims, and, quite understandably, the simultaneously-filed settlement grants the exposure-only plaintiffs no relief for those claims. For example, under the settlement, even class members who pay significant amounts of their own money for medical monitoring, but who never contract an asbestos-related disease, will receive no compensation for the medical monitoring claim that was alleged in the complaint. Contrary to the allegations of the settling parties, therefore, there is no controversy which would lead to the "honest and actual antagonistic assertion of [the] rights" alleged in the complaint. *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 344 (1892).

Furthermore, in *Moore*, the complaint at least sought relief of a kind that a federal court is capable of conferring. If jurisdiction was lacking there, *see also Granfield v. Catholic Univ. of America*, 530 F.2d 1035 (D.C. Cir.), *cert. denied*, 429 U.S. 821 (1976); *Brown v. Watkins Motor Line*, 596 F.2d 129, 131-32 (5th Cir. 1979), then surely there is none here, where the complaint has no relation to relief actually sought, and the relief actually sought—the imposition of a futures claims procedure—is not within the court's competence to award. Put another way, class counsel and CCR put the fear and medical monitoring claims before the district court not as dedicated advocates of those claims, but for the sole purpose of seeking the district court's judicial approval of a settlement that it would not otherwise be empowered to approve. In this context, class counsel and the named plaintiffs will not be (and, as the settlement makes plain, have not been) aggressive advocates for the supposed rights of the exposure-only class asserted in the complaint (*i.e.*, medical monitoring and other claims not compensable under the settlement). In the absence of this adversity, the district court lacked jurisdiction over the claims of the exposure-only class.

Recognizing that "this class action was settled before the complaint was filed" (JA 218) and that it "lacks a dispute as to the remedy" (JA 222), the district court relied on cases in which the government entered consent decrees simultaneously with the filing of complaints. JA 220 (citing, *e.g.*, *SEC v.*

Randolph, 736 F.2d 525, 528 (9th Cir. 1984)). In so ruling, the district court erred for three distinct, but related, reasons which, in fact, demonstrate why Article III jurisdiction is lacking here.

First, the consent decree cases posed a real threat to the defendants because they involved viable causes of action that presumably could have, and would have, been tried had negotiations failed or the settlement not been approved. *See, e.g., Randolph*, 736 F.2d at 527. Here, the claims alleged posed no such legal threat, the plaintiffs had no intention of pursuing them, and the defendants conceded that those claims could not have been litigated on a class basis. JA 131. To be blunt, this was a fake case from start to finish, and the complaint was simply a ruse to provide access to a federal forum.

The settling parties never seriously contested this point until they claimed in the Third Circuit that "there is no way to predict the outcome[] ... of this case if the settlement fails" and that there is "no support for appellants' assertion that the exposure-only plaintiffs never intended to litigate their claims if the settlement were disapproved." CCR 3d Cir Br. 38 n.19, 39. But in this Court CCR has effectively conceded the falsity of its prior assertions and acknowledged that the complaint sets out "hypothetical litigation that assuredly *never* will occur." CCR Br. 19. In any event, as explained above, the exposure-only plaintiffs themselves stated that they had no desire to seek any present relief, including particularly a medical monitoring remedy and damages for asbestos-related fear. Their willingness to abandon such claims is not surprising since CCR has been unable to point to a single case in its entire history in which it has settled (or even defended against) an exposure-only claim, nor has class counsel claimed that they have ever filed an exposure-only claim against any defendant. *See* 3d Cir. Jt. App. 1202-03 (CCR's chief operating officer testified that he knew of neither any exposure-only claim ever settled by CCR nor any such claim ever asserted by class counsel).

Moreover, class counsel agreed with CCR shortly before the filing of the class action complaint that they would not file

suit on behalf of any asbestos client against any CCR defendant unless certain medical criteria were met. *See, e.g.*, JA 534-35. These agreements were intended primarily to bar class counsel from representing clients with so-called "pleural claims"—claims involving asbestos-related lung abnormalities but little or no functional impairment, but for which thousands of prior claimants had received significant compensation (JA 530-34, 770-71); *a fortiori*, the agreements barred them from representing exposure-only class members. There is, therefore, no doubt that the complaint presented a feigned controversy, containing causes of action that class counsel never intended to litigate on January 15, 1993, or at any time thereafter.[14]

Second, in the cases relied on by the district court, the relief sought in the complaint was substantially the same relief accorded in the settlement. *Randolph*, 736 F.2d at 529 (court notes that only one of many legally available remedies was arguably not incorporated into consent decree); *United States v. Allegheny-Ludlum Indus.*, 517 F.2d 826 (5th Cir. 1975); *Colorado Environmental Coalition v. Romer*, 796 F. Supp. 457, 459 (D. Colo. 1992)("Plaintiff's complaint set out two specific requests for relief, both of which were achieved precisely and completely by the consent decree ..."). This nexus between the relief sought and the relief obtained underscores that the complaints in the consent decree cases involved real controversies between the parties. *See Baker v. Carr*, 369 U.S.

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[14] The agreements restricting class counsel's future representation of asbestos plaintiffs were amended after the American Bar Association's Committee on Professional Responsibility found them to violate Rule 5.6(b) of the Model Rules of Professional Conduct. *See* ABA Formal Opin. No. 93-371. The amended versions, entered into *after* the class action complaint and settlement were filed, state that, absent "some unforeseen circumstance," class counsel will "recommend" to their future clients that the clients defer their personal-injury claims until certain medical criteria are met. *E.g.*, JA 559. For a detailed explanation of the settling parties' and their expert witnesses' ever-changing interpretations of the restrictions on class counsel's future practice, see Koniak, *Feasting While The Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 Cornell L. Rev. 1045, 1128-37 (1995).

186, 204 (1962). Here, on the other hand, CCR sought out the plaintiffs' lawyers in order that it might be "sued" for relief that class counsel's clients had no intention of recovering and that bore no relationship whatsoever to the relief provided in the settlement.

In the court below, CCR responded that "the exposure-only plaintiffs are getting substantial relief in settlement of the claims made in the complaint." CCR 3d Cir Br. 38 n.19. If that statement is not false, it is at least highly misleading. Even assuming that the settlement's claims procedure provides "substantial relief," especially when compared to what the tort system would provide, whatever future "relief" there may be has no relationship to the claims in the complaint. Only in a world of make-believe can one say that a claims procedure that provides no payments for the fear claims and no medical monitoring was "in settlement of" the complaint.[15]

Finally, the consent decree cases differ from this case in another highly relevant respect: They bargain away only the government's rights and specifically preserve the rights of individuals harmed by the defendant's conduct, *i.e.*, they do *not* purport to be binding on absent members of the public. *See, e.g., Rodgers v. United States Steel Corp.*, 536 F.2d 1001, 1003 (3d Cir. 1976)(specifically noting that individuals' rights to sue are preserved under consent decree). Here, the overriding purpose of the settlement was to bind the absent class

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[15] This Court's pendent jurisdiction jurisprudence further demonstrates that jurisdiction is lacking when parties fabricate a controversy solely to gain access to a federal forum. Under *United Mine Workers v. Gibbs*, 383 U.S. 715, 727 (1966), when a plaintiff asserts an insubstantial federal claim for the purpose of attaining a federal forum for a pendent state claim, the district court should decline to exercise jurisdiction over the state claim. *See also* 28 U.S.C. 1367(c)(2), (3), and (4). Similarly, here, when the complaint and settlement were filed, the only claims that the exposure-only plaintiffs arguably had standing to assert—the fear and medical monitoring claims—were not bona fide claims, but were asserted solely so that the settling parties could gain access to a federal forum.

members, not the settling parties, so that CCR will no longer have to defend asbestos cases in court.

CCR responded below that, since this case was certified as a class action—the propriety of which we take up in Part II *infra*—the named plaintiffs here did not improperly negotiate away the rights of others. That response begs the question. It is true that named plaintiffs may, in accordance with Rule 23's safeguards, make binding decisions for others. But the fact that class counsel have bargained away the fear and medical monitoring claims for an absentee class distinguishes this case from the consent decree cases and other bi-polar litigation, where, because the rights of others are not compromised, it can generally be presumed that the parties are resolving an actual controversy between themselves. Thus, if class counsel had entered into this very settlement for the purpose of redressing only the claims of their actual current clients, *i.e.*, the 14,000 clients whose disease claims they settled for cash, this case would more closely resemble the consent decree cases. By contrast, however, where the parties concede that CCR sought out class counsel for the purpose of establishing a private claims procedure to resolve only the *future* asbestos personal-injury claims of hundreds of thousands of unnamed and unknown individuals, the vicarious nature of the representation is further evidence of the absence of an Article III case or controversy between the plaintiff class and the CCR defendants.

II. THE THIRD CIRCUIT'S DECISION SHOULD BE AFFIRMED UNDER RULE 23 FOR LACK OF "SUPERIORITY" AND INADEQUACY OF REPRESENTATION.

The Third Circuit held that this class action met neither Rule 23(a)'s typicality and adequacy of representation prerequisites, nor Rule 23(b)(3)'s requirements that common questions predominate over individual questions and that the class action be superior to individual adjudications. Each of those rulings is independently sufficient to sustain the court of appeals' decision below. In this brief, we focus on

"superiority" and "adequacy of representation," but first we present several overall responses to the settling parties' briefs.

Although petitioners' question presented is crafted to evade the Third Circuit's multi-faceted ruling, it cannot do so. Even if, for instance, this Court holds that Rule 23(a)(2) "typicality" may be assessed *solely* through the lens of the settlement—as the settling parties urge—class certification would still be improper. The named exposure-only plaintiffs are, if anything, *more* atypical of the class when the settlement is considered than they are when their "claims" are considered from the perspective of the complaint. As the court of appeals held (Cert. App. 53a), because the settlement releases the future claims of class members whose injuries, desires, and even identities are unknown and unknowable, no class representative can be typical of the "futures" class.

That conclusion follows from *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 158-59 & n.13 (1982), an employment discrimination class action in which the Court held that a Mexican-American employee, who was denied a workplace *promotion*, was not typical of a class of Mexican-American job *applicants*. If the differences between the class representatives and the absentees in *Falcon* defeated typicality, then this case does not even remotely justify certification, where a handful of representatives purport to seek relief over a dizzying array of unlawful conduct under the laws of 50 jurisdictions, and claim to represent the victims of future injuries, whose circumstances are obviously unknowable. *See also East Texas Motor Freight System, Inc. v. Rodriguez*, 431 U.S. 395, 403-05 (1977).

Similarly, the court of appeals' holding that "common questions" do not "predominate" over individual variations applies with equal force in the settlement and litigation contexts. In both situations, the *only* common issue is the class members' exposure to asbestos, and that is not a "question" at all, but a prerequisite to class membership; each class member's smoking history, level of exposure, disease, and amount of damages, not to mention differences in applicable law, are present in the future personal-injury causes of action released by the

settlement, just as they are in the exposure-only claims alleged in the complaint. To be sure, the settlement purports to resolve the thousands of vexing individual variations in the class members' claims by homogenizing them in the settlement's claims process. But to say, as does CCR (Br. at 42), that the end product itself satisfies Rule 23's carefully crafted criteria is to do more than simply take the settlement into account; rather, it is to permit settlement to override the Rule's certification criteria altogether and to treat Rule 23(e)'s fairness inquiry as a *surrogate* for class certification. *See* CCR Br. 43. That result is at odds with the Rule's overarching concern for protection of the absentees, among other reasons, because a fairness inquiry is not sufficient to protect the divergent subgroups in a complex class action nor to delve into the adequacy of counsel's negotiations. *See GM Trucks*, 55 F.3d at 796-77.[16]

The Court need not consider the Rule's purpose in rejecting petitioners' approach, however, because its language and structure do not permit Rule 23(e) to swallow-up the rest of the Rule. Rule 23(e) does not discuss the certification criteria, but says only that "[a] class action"—presumably the same "class action" referred to in Rule 23(b)—"shall not be ... compromised without the approval of the Court...." This language indicates that Rule 23(e) contemplates judicial review of settlements that independently meet the certification criteria and demonstrates that *all* "class actions," including settlement classes approved under Rule 23(e), must meet the requirements of Rules 23(a) and (b). Thus, the approval requirement of Rule 23(e) is plainly in addition to, rather than a substitute for, strict application of the certification criteria.

This reading of the Rule—that its commands are consecutive, not alternative—is confirmed by the logic of *Eisen*

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[16] Here, for instance, despite the exclusion of class counsel's individual clients from the class definition, the district court did not permit objectors to depose class counsel. This ruling was presumably premised on the district court's belief that a finding of fairness was a proper proxy for class certification findings. *See* Cert. App. 226a.

v. Carlisle and Jacquelin, 417 U.S. 156 (1974). There, the named plaintiffs argued that they should be excused from giving class members notice and opt-out rights under Rule 23(c)(2) because "adequate representation, rather than notice, is the touchstone of due process in a class action...." *Id.* at 176. "[T]his view has little to commend it," this Court held, because "Rule 23 speaks to notice as well as to adequacy of representation and requires that both be provided." *Id.*; *see also id.* at 176 n.13 (class members' opt-out rights also protected). So too here, petitioners may not pick and choose which portions of Rule 23 are applicable. Rather, as we show below with respect to the superiority and adequacy prongs of the Rule, the protections provided class members under Rules 23(a) and (b) serve functions for which Rule 23(e) does not provide an adequate substitute.[17]

A. This "Futures" Class Action Is Not Superior To Individual Adjudications When Class Members' Claims Accrue.

There are serious due process problems with any suit that attempts to bind a class of persons with respect to their future *in personam* damages claims. *See Shutts*, 472 U.S. at 810-13. We agree, however, with the Third Circuit that the due process issue need not be reached since, under Rule 23(b)(3)(A), this class action cannot be deemed "superior" to individual adjudications—or even to a more modest class action—commenced when the individuals sustain injuries giving rise to a claim for damages.

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[17] We believe that Rule 23's text permits the district court to consider a settlement's effect on case management, which is one aspect of "superiority." *See* Fed. R. Civ. P. 23(b)(3)(D). However, that factor—which would allow the court to take into account a settlement's effect on the purely mechanical difficulties of trying a complex class action—has no bearing here, where the case fails each of the Rule 23 requirements on which the court of appeals expressly ruled—typicality, adequacy of representation, predominance, and (other aspects of) superiority.

In cases involving bankruptcy and "limited-fund" certifications under Rule 23(b)(1)(B), it is arguably a practical necessity to provide for future claimants. *Cf. Mathews v. Eldridge*, 424 U.S. 319, 341-49 (1976). But reliance on those cases would have no place here because, as the district court put it, "the assets of the defendants do not constitute a limited fund." Cert. App. 230a. To the contrary, the settling parties' financial expert testified that, over the first 10 years of the settlement, CCR's gross profits were projected at $133.8 billion, while the maximum payout under the settlement was $1.289 billion, 60% of which would be paid by insurance. *See* 3/15/94 Tr. at 88-89. Outside of the "limited fund" and bankruptcy contexts, the law generally bars certification of futures class actions.[18]

And for good reason. "[I]t was clearly understood [when Rule 23(b) was promulgated] in 1966 that no class member could possibly be bound to a judgment who was not given

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[18] *National Super Spuds v. New York Mercantile Exchange*, 660 F.2d 9, 17-18 (2d Cir. 1981); *Shults v. Champion Int'l Corp.*, 821 F. Supp. 520, 521-24 (E.D. Tenn. 1993); *Wajda v. Penn Mutual Life Ins. Co.*, 80 F.R.D. 303, 313 (E.D. Pa. 1978); *Yandle v. PPG Industries, Inc.*, 65 F.R.D. 566, 572 (E.D. Tex. 1974); *see also Schweitzer v. Reading Co.*, 758 F.2d 936, 943 (3d Cir.)(rejecting argument that "a person who had no inkling that years in the future he would be killed by a product produced by the debtor would be required to file a claim in the debtor's ... bankruptcy proceedings so as to preserve any rights that he might have in a future tort suit"), *cert. denied*, 474 U.S. 864 (1985); *Foster v. Bechtel Power Corp.*, 89 F.R.D. 624, 626-27 (E.D. Ark. 1981)(future plaintiffs cannot satisfy typicality, commonality, or adequacy of representation requirements); *Freeman v. Motor Convoy, Inc.*, 68 F.R.D. 196, 200 (N.D. Ga. 1975)(class action could not include future plaintiffs because "overbroad framing of the class may operate to deprive absent members of due process")(citing *Johnson v. Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125-27 (5th Cir. 1969)(Godbold, J., concurring)); Note, *The Inclusion of Future Members in Rule 23(b)(2) Class Actions*, 85 Colum. L. Rev. 397, 408 (1985)(certification of "futures" class violates due process because courts must apply Rule in a "factual vacuum," introducing "a substantial element of speculation, distortion, and confusion" into certification process).

actual notice of the proceeding and [was] in a position to exercise intelligently the choice to opt out." Carrington & Apanovitch, *The Constitutional Limits of Judicial Rulemaking: The Invalidity of Proposed Rule 23(b)(4)*, Ariz. L. Rev. (forthcoming 1997). Despite the formal right to opt out under Rule 23(c)(2), the problem here is that, because of a lack of information before an injury has been sustained, "persons might neglect to 'opt-out' of the class, and then discover some years in the future that they have contracted asbestosis, lung cancer or other pulmonary disease." *Yandle v. PPG Industries, Inc.*, 65 F.R.D. 566, 572 (E.D. Tex. 1974).

This Court has held that, in actions that are primarily for money damages, absent class members must receive, as a matter of due process, notice and an opportunity to opt out. *Shutts*, 472 U.S. at 813. The standard applied in *Shutts* was whether, at the time the absent class member is given notice, he or she is able to make an informed decision. *Id.* at 813. Whether viewed as a matter of due process, or Rule 23(b)(3) superiority, that standard was not met here for two distinct, but related, reasons.

First, without question, many of the class members received no notice at all. Of the seven representative plaintiffs who testified on the subject, *six* said that they did not see the publication notices which provided the crucial first-link in providing individual notice to the class.[19]

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[19] *See* JA 353-54, 362-63, 368-69, 373-74, 389-90, 397-98, 420-21, 693. The district court's statement that the class representatives obtained significant information from sources other than the notice materials is incorrect, as the testimony shows. For instance, the district court implied that plaintiff Kekrides learned about the settlement from her brother-in-law. Cert. App. 223a. But Kekrides simply said, in response to a question concerning whether she saw anything about the class action on TV, that "[i]t's my brother-in-law [who] see it on TV." JA 390. Indeed, the district court's "finding" (Cert. App. 222a) that some of the named representatives received "notice" because they were recruited as class representatives only underscores that class members who were *not* class representatives would likely be left in the dark.

Moreover, it is undisputed that certain respondents—who contracted asbestos-related diseases after the opt-out period ended—did not receive notice of the settlement. *See, e.g.*, JA 918-19 (class member who had no knowledge of settlement or mesothelioma diagnosis until after opt-out date); *see also* Dkt. No. 1311, Mem. Op. (Nov. 10, 1994)(rejecting motion to permit late opt out by class members who had no notice of action or of right to opt out).

Aside from the notice campaign which, as noted, did not reach most of the named plaintiffs, the settling parties relied heavily on 58 national labor unions, 13 of which did not cooperate at all with the notice program, and the great majority of which did not agree to provide to their members the individualized notice packet, including the opt-out form, even at CCR's expense.[20] Moreover, because many exposures took place years ago, many potential asbestos victims are former union members who simply cannot be reached by their unions. JA 844-45 (union president testifying that 200,000 former union members cannot be notified by union). Finally, millions of non-union class members, including virtually all of the relatives of exposed persons, were very unlikely to have received notice unless they saw the media advertisements.

Nor can there be any doubt—given the immense size of the class and the nature of an airborne toxin—that many people who may eventually contract an asbestos-related disease are unaware that they have been occupationally exposed *at all*, as was true of two of the class representatives. *See, e.g.*, JA 367-68 (did not know anything about asbestos exposure until

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[20] The district court stated that six million union members received individual notice. Cert. App. 221a. This statement should not be misconstrued. The hearsay declaration of the CCR's notice expert, on which the court's statement is based, simply proclaimed that 35 unions ran "clip-art," *i.e.*, small announcements, in publications sent to union members (who may or may not have been class members), which did not provide any information on the terms of the settlement, much less an opt-out form. JA 164. What occurred here is not what this Court has understood as individualized notice under Rule 23 or as a matter of due process. *See Eisen*, 417 U.S. at 173-75; *Shutts*, 472 U.S. at 812.

husband's mesothelioma revealed on autopsy; husband apparently had no idea of extent of exposure, and, possibly, that exposure occurred at all), 380. Others who are aware that they have been in a work place where there was some level of asbestos would often have no way to know how serious their exposure was and, accordingly, could not make an informed decision on whether it would be worthwhile to retain an attorney and determine their legal rights. *See Shutts*, 472 U.S. at 813 (due process requires that class member be able to determine whether their claims are "sufficiently large or important" to pursue independently). Both of the problems discussed above—that many individuals would not learn of the action in time, and that those who did would be unaware either of their exposure or its extent—are inherent in an action that tries to provide notice to individuals who are not yet injured.

Second, even assuming that all class members had been notified and understood the settlement, including what rights in the tort system they were giving up, the settlement still would not be superior to individual adjudication. Because absent class members have not suffered an asbestos-related injury, the settlement presents them with a fundamentally unfair opt-out choice. Class members are required to choose from a schedule of cash compensation (JA 110)—or no compensation at all for certain diseases—before they have contracted any asbestos-related disease. Assume, for instance, that an uninjured class member (i) does not like the elimination of compensation for pleural disease, (ii) believes that the payment range for asbestosis is adequate, and (iii) regards the payment range for lung cancer as unfair. Whether or not the class member has rationally assessed the settlement's terms, the question under Rule 23(b)(3) is whether it is "superior" to put the class member to the "opt-out/stay-in" decision before he or she has been diagnosed with any disease. In light of the authorities discussed above, the answer is plainly "no" because the class member does not have the information needed to make a rational choice. *See Barry v. Barchi*, 443 U.S. 55, 66 (1979)(due process requires that potential relinquishment of state-created property rights may only be demanded "at a

meaningful time and in a meaningful manner")(quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)(emphasis added)); *see also Ivy v. Diamond Shamrock Chems. Co.*, 996 F.2d 1425, 1435 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1125 (1994)(acknowledging that actual notice to future victims of mass toxic tort would "probably do little good" because of inherent inability of uninjured persons to make rational decision).

Moreover, at the time class members were forced to make the opt-out decision, they were not able to predict what their personal circumstances would be when and if they contracted an asbestos-related condition. *See* Wages Testimony, JA 845. At that time, matters such as marriage, employment circumstances, an individual's age and that of one's children, and other factors would surely affect whether a class member would want to bring a case in the tort system rather than participate in the alternative dispute process. For example, a class member who, 30 years from now, contracts lung cancer that does not meet the settlement's medical criteria, but is sufficient to obtain substantial damages under state law, would almost surely want to pursue that claim in court. Again, for present purposes, the question is not whether the settlement is "fair" in the abstract, or whether Congress might decide to require everyone to make the opt-out choice now, but whether Rule 23 allows the CCR and class counsel to bind the entire class to a settlement the consequences of which are inherently unknowable.[21]

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[21] In *Ivy*, 996 F.2d at 1435, the Second Circuit rejected a due process challenge to the "Agent Orange" class action brought by persons who did not have notice of the action. The Second Circuit held that *Shutts* does not apply to classes of unknown plaintiffs and that "society's interest in the efficient and fair resolution of large-scale litigation outweighs the gains from individual notice and opt-out rights, whose benefits here are conjectural at best. ...[P]roviding individual notice and opt-out rights to persons who are unaware of an injury would probably do little good." *Id.* Although the latter point strongly supports our notice argument, *Ivy* does not come to grips with *Shutts*, which made no exceptions for future claimants. The answer to the problem posed by *Ivy* is not that opt-out

(continued...)

In sum, by compelling the opt-out decision before an injury occurs, the potential victims of CCR's products are forced to gamble, rather than to make the informed choice contemplated by Rule 23 and due process. It is precisely to avoid this problem that Rule 23 requires full and fair notice in a (b)(3) class action. But, by the very nature of this settlement, that notice cannot be provided here. Thus, the district court's class certification fails the superiority requirement of Rule 23.

B. Representation Of The Class Was Inadequate.

CCR's question presented is most misleading as applied to the Third Circuit's finding of inadequate representation under Rule 23(a)(4). The court did not *ignore* the settlement, but looked both to the settlement and the complaint to find that the class representatives had not adequately represented the absentees' widely divergent interests.

It is necessary for a court, in considering certification of any settlement class action, to look first at the complaint, as if it were to be litigated, in assessing adequacy of representation because it is the claims in the complaint that the class members would be releasing as part of the settlement. Thus, the exposure-only class representatives' decision to release the medical monitoring claims for *all* of the class members, for instance, when such a claim may be valid in some jurisdictions, but not in others, *compare Paoli*, 916 F.2d 829, *with Ball*, 958 F.2d 36, clearly favored some class members over others. Moreover, because most class members are not currently ill, they might want to press their medical monitoring claims. But that would make no sense for already injured class members—particularly those with cancer—for whom early diagnosis and prevention is of no comfort. Thus, from the standpoint of the medical monitoring claims alone, neither the

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[21](...continued)
rights of future class members necessarily must be curtailed, but that, under Rule 23(b)(3), classes of future damage claimants may not be certified, especially where an airborne toxin is involved.

class representatives, nor their lawyers, could adequately represent a massive, undifferentiated class of the kind contemplated here. *See Falcon*, 457 U.S. at 158-59.[22]

The Third Circuit moved past its discussion of the complaint, however, and did precisely what petitioners say courts should do: It looked to the settlement terms in conducting its adequacy analysis. The court began with the settlement's "most salient conflict" (Cert. App. 49a)—that it covers both class members who have current asbestos-related diseases and those who do not. The uninjured class members would desire, for instance, a back-end opt out, which would give them access to the tort system when their injuries accrued, *see Bowling*, 143 F.R.D. at 150, while class members with current injuries would not need such protection. Even more important, the uninjured class members—some of whom may become sick decades from now—would obviously want protections against inflation, but the settlement, instead, favors current claimants, by paying all claims in 1992 dollars (JA 110), making recoveries in the latter years almost worthless.[23]

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[22] As noted earlier (*supra* at 17 n.4), the inadequate representation was particularly poignant here because the class representatives' testimony was overtly hostile to the claims of the exposure-only class members.

[23] The district court took judicial notice of statistics showing that, in the 20 years prior to the settlement, consumer prices rose 215.6%, *see* U.S. Dept. of Labor, Bureau of Labor Stat., CPI-U (U.S. city avg.—All items), while inflation for medical care—an important component of personal-injury awards—ran at 415.6%. *Id.* (U.S. city avg.—Medical care); *see* Dkt. No. 1005. Various studies have demonstrated that tort awards and settlements keep pace with, or outstrip inflation, and are highly sensitive to medical care costs. *See, e.g.*, Eisenberg & Henderson, *Inside the Quiet Revolution*, 39 U.C.L.A. L. Rev. 731, 762-63, 787 (1992); Hensler, *et al.*, *Trends in Tort Litigation — The Story Behind the Statistics* 14-17 (Rand 1987); Peterson, *Compensation of Injuries — Civil Jury Verdicts in Cook County* 46 (Rand 1984). In contrast to the settlement, programs which have actually gained Congressional approval, such as social security disability, including those that eliminate tort claims, such as black lung, make inflation adjustments on a regular basis.

The settlement also drives a wedge between class members who eventually will have claims compensable under the settlement, and those that will have claims that are valid under state law but are non-compensable under the settlement. Historically, the latter claims are settled by CCR, in virtually 100% of the cases, for substantial amounts of money. JA 124 n.18. Moreover, CCR concedes that the settlement's overall medical criteria are generally "more stringent than those required under the laws of most states...." JA 916. Thus, tens of thousands of class members who would have obtained recoveries in the tort system, but not under the settlement, had their rights bargained away for the benefit of class members that the settling parties thought were truly deserving. This drastic alteration of state tort law is particularly evident in two areas.

First, "pleural" claimants obtain no cash recovery under the settlement, but currently recover significant amounts under state law. The settling parties claim there is no conflict here because all class members obtain "insurance" for certain illnesses, but that is little solace to a class member who is now 55, gets pleural disease at age 75, and is told that his valid state-law claim was bargained-away many years earlier in order to purchase insurance for himself (which he doesn't want) and for everyone else (which he doesn't need). Again, Congress might make that policy judgment, but a court may not under the guise of Rule 23.

Second, the settlement resolves a dispute in the medical community over causation of asbestos-related lung cancer in a manner that may extinguish as many as 50% of the claims that currently obtain verdicts and settlements in the tort system. JA 838. Again, some future disease victims are benefitted to the detriment of others.[24]

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[24] It should be recalled that class counsel represented thousands of clients who were effectively opted out of the class and who obtained $215 million in settlements (including at least $70 million in fees), notwithstanding the fact that, had they been included in the class, many of them would not have received a penny under the settlement's strict

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Similarly, the settlement binds spouses, relatives, and household members of occupationally-exposed class members, but they were given no opt-out rights, even though loss-of-consortium claims can be pursued independently in many jurisdictions. *See* Tsarouhas, *Bowen v. Kil-Kare, Inc.: The Derivative and Independent Approach to Spousal Consortium*, 19 Ohio N.U.L. Rev. 987, 990-93 & n.43 (1993). Even more startling, the settlement extinguishes the loss-of-consortium claims without any cash recovery. Thus, for example, a single asbestosis claimant is entitled to $2,500 under the settlement's simplified payment procedures (JA 79, 110), and an identically situated claimant *and* his spouse, who holds a valid state-law claim, are, collectively, entitled to the same amount. *Compare Bowling*, 143 F.R.D. at 170 (substantial separate payment for spousal claims in mass-tort settlement). The settlement thus enriches some claimants at the expense of others, by extinguishing valid causes of action in derogation of the *Erie* doctrine. *See* Carrington & Apanovitch, *supra*, ___ Ariz. L. Rev. at ___ (interpreting Rule 23 to permit global mass-tort settlements would violate Rules Enabling Act, and even federal statute authorizing such settlements would "entail a massive trespass on the *Erie* principle").

The settling parties dodge each of these representational problems by arguing at a level of generality that eviscerates the adequacy of representation requirement. It is sophistry to say, as does CCR, that there were no class antagonisms because the class members had a common desire to "achieve[] a global settlement." CCR Br. 48. There is no way of knowing what the "future" class members desired, and it is absurd to suggest that those whose state-law claims would be extinguished would have wanted this settlement. And it simply begs the question to say, as does CCR (Br. at 44), that the class members were

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[24](...continued)
medical criteria. CCR's chief operating officer testified repeatedly that the medical requirements imposed on class counsel's side settlements were far more lenient than those imposed under the settlement. JA 770, 771.

united in seeking an adequate settlement recovery. The principal question in any adequacy of representation analysis is not the *amount* of the recovery, but how the recovery is *distributed*. As the conflicts in this case powerfully demonstrate, it was not possible for one set of counsel to represent all the millions of persons for whom the CCR companies may, in the future, bear legal liability, on claims that involve an almost infinite number of legal and factual permutations.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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January 15, 1997

APPENDIX

EXCERPTS FROM THE EVIDENTIARY RECORD

Robert Georgine

[Excerpts from February 28, 1994 court testimony, Tr. 115-16, 170-71]

[115] Q. And as we sit here today, you are not seeking money from any of these companies that you have sued in this case; isn't that right?

[116] A. That's true.

Q. And at the time the lawsuit was filed -- at the time you became class representative, you were not seeking money from them, is that correct?

A. That's true.

* * *

[170] Q. But Mr. Georgine, you've been represented by Mr. Motley in this case. Has he indicated to you that you have a current right to seek money damages from CCR --

A. Well--

Q. --because of what asbestos has done to you?

A. --I don't believe I have a current right to seek damages--

Q. That's correct.

A. --from CCR.

Q. And neither has --

A. Only because -- only because I'm not impaired, and I have [171] no damage that I know of that's caused by asbestos.

[Excerpts from January 27, 1994 deposition, Tr. 65-66, 113]

[65] Q. Well, in the present case, do you believe that the asbestos companies owe you [66] money? M-o-n-e-y.

A. Owe me personally?

Q. Yes.

A. I believe that if there was anything that happened to my lungs that was asbestos-related, that they would owe me money, yes.

Q. But as of today, nothing has happened to your lungs that's asbestos-related that you know of?

A. That letter [from my doctor] tells me that there is nothing that shows.

Q. So as of today, you are not seeking money from the asbestos companies for yourself; is that right?

A. For myself, that's right.

* * *

[113] Q. As you sit here today, you are not suffering any emotional distress because you might come down with an asbestos --

A. No, I am not. I am not.

Q. And you were not at the time you entered this lawsuit?

MR. McCONNELL: Brian, time is limited. That was the sixth time.

MR. WOLFMAN: That was the first time.

I said, as he sits here today, is he suffering any emotional distress. His answer was no. I began my next question, and you interrupted me.

BY MR. WOLFMAN:

Q. My next question is: As of the time you entered the [114] lawsuit, were you suffering any emotional distress on account of asbestos exposure?

A. No, I was not.

Ambrose Vogt

[Excerpts from February 24, 1994 court testimony, Tr. 164-65]

[164] Q. You testified under oath on January 12th, 1994, that you were not seeking money damages at the time that you agreed to be a class representative in this case, and at the time that the lawsuit was filed? You testified that way under oath then, is that correct?

A. Yes.

Q. And that was true then, is that right?

A. Yes.

[165] Q. And it is true today, is it not, you are not seeking money damages today?

A. Not today, no.

[Excerpts from January 12, 1994 deposition, Tr. 17, 34-35]

[17] Q. Are you seeking money damages in this case?

A. Not at this time. I just want the assurance that there will be some money left if anything ever develops.

* * *

[34] Q. On January 15, 1993 when this lawsuit was filed in Federal District Court in Philadelphia, did you feel like you had been harmed by asbestos?

A. Harmed? No. Just exposed.

Q. On January 15, 1993 when this lawsuit was filed in Philadelphia, did you feel like the asbestos companies owed you some money then?

A. No.

Q. When I say "some money," I mean anything more than zero.

A. Yeah.

Q. That's what you understand that to mean?

A. Uh-huh.

Q. So on January 15, 1993 it was your belief that the asbestos companies did not then owe you any money at all?

[35] A. Right.

Ty Annas

[Excerpts from February 24, 1994 court testimony, Tr. 238-39, 248, 272-73]

[238] A. I have nothing wrong with me. So therefore, I should not and will not seek any damages or actions. If my wife's breathing had not deteriorated, there would never had been a case against the [239] asbestos companies.

* * *

[248] Q. At deposition you testified that as of January 15, 1993 that you hadn't authorized anybody to sue for money for yourself because of your asbestos exposure, is that right?

A. That's right.
Q. And that is correct today?
A. Yes, sir.

* * *

[272] A. I don't believe if there is [sic] impairment that anyone needs to be trying to collect money. If there is a situation down the road five years from now with me, and my asbestos exposure develops into an impairment, certainly I can go for a settlement, and I'm concerned about my son Mike back there the same way. ... People that are not impaired [that are trying to collect money] are exactly like those on the welfare system. ...

Q. -- you then believe that people who have pleural plaques should receive no compensation whatsoever, and that was your intent in entering into this agreement, correct? ... [objection overruled]...

[273] A. If they are not impaired.

Q. If they're not impaired they should receive no compensation whatsoever?

A. That's my feelings.

[Excerpts from January 14, 1994 deposition, Tr. 15-16, 61, 91, 94]

[15] Q. Now, as of January 15, 1993, did [16] you authorize anyone to sue for money losses for yourself as a result of your exposure to asbestos?

A. No, I did not.

* * *

[61] Q. Mr. Annas, as we sit here today, do you believe that the CCR people owe you any money today?

A. I hope they don't ever owe me any money.

Q. On January 15, 1993, was it your intention to sue CCR for money damages for yourself, for your own injuries?

A. No.

* * *

[91] Q. Have you ever instructed a lawyer to sue anyone for your mental anguish for your own condition?

A. No. And I hope I never have to.

Q. Have you ever instructed a [92] lawyer to seek damages for you for your own mental anguish?

A. No.

* * *

Q. You've not filed a suit for your own damages, have you?

A. No. No.

* * *

[93] Q. Have you ever had an exam just to determine whether you have asbestos-related disease?

A. Only the x-rays.

Q. How much do the x-rays cost; do you know?

A. About $125.

Q. Do you pay for that out of pocket, or do you have somebody that pays it for you?

A. Well, I'm on Medicaid, and I pay it, but they file the claim.

Q. And then it gets reimbursed; is that right?

A. Or they refuse it.

* * *

[94] Q. Let's hope and assume that you never develop an asbestos-related disease. All right?

A. Yes.

Q. If that is the case, would you expect, then, that the asbestos companies don't owe you anything?

A: Not me.

Timothy Murphy

[Excerpts from January 6, 1994 deposition, at 22-24, 32-33, 3d Cir. Jt. App. 1122-1125]

[22] Q. What did you do when you got this document [indicating no asbestos-related abnormalities]?

A. Felt a sigh of relief.

Q. You were happy you didn't have any problems?

A. Yeah, right.

Q. When you got the letter, did you decide that you wanted to sue somebody?

A. No, I didn't.

Q. You made the decision you didn't want to sue anybody; right?

A. It never crossed my mind.

Q. When did Mr. Satterley [an attorney] call you?

A. It was shortly after that.

Q. Can you tell me what he said?

A. He basically said that I fit the profile of someone who was occupationally [23] exposed to asbestos for over a long period of time and that I could help him in their litigation.

Q. Did you ask Mr. Satterley to file a lawsuit for you?

A. No.

Q. Did you tell Mr. Satterley that you wanted to make a claim for medical monitoring?

A. No.

Q. Do you know what medical monitoring is?

A. No.

Q. Did you tell Mr. Satterley or any other lawyer that you were so anguished about your problem that you felt that defendants ought to pay for it?

MR. LOCKS: Objection to the form of the question.

BY MR. BARON:

Q. Did you ever tell anybody that?

A. No.

Q. So I can cut all of this off quickly, would it be fair to say that you have never told any lawyer that you were upset about [24] your exposure to asbestos and you wanted to sue somebody; is that right?

MR. LOCKS: Objection to the form of the question.

BY MR. BARON:

Q. Is that right?

A. I never said anything to any lawyers.

* * *

[32] Q. Let's go back, let's say, a month in time, prior to the communication that you had with Mr. Weingarten [of Gretizer & Locks] three or four weeks ago. Before that communication, did you know what it was that you were claiming in this lawsuit?

A. I know what I -- that I claimed that I was occupationally exposed to asbestos over a long period of time.

Q. Did you know that you were claiming money damages?

A. No.

Q. To this day, do you believe you are claiming money damages in this case?

A. No.

Q. So you are not seeking any recovery in terms of money damages in this case; is that right?

A. No. Not at this time.

Q. So you've decided that you don't want to seek money damages in this case, correct, at this time?

A. At this time.

Q. Has that always been your belief [33] that you did not want to seek money damages at this time?

A. Right.

Q. Until you develop asbestos-related disease, you don't want any money damages from these people, do you?

A. Well, I hope I don't get it.

Q. And you hope you don't get it, and if you don't get it, as far as you are concerned, they don't owe you anything; right?

A. Right.

Carlos Raver

[Excerpts from January 11, 1994 deposition, Tr. 84, 105-06]

[84] Q. When you filed this lawsuit, the one that was filed in January of 1993, at the time that you filed the lawsuit, had you decided that based on your condition at that time that you didn't deserve any money and didn't want any money at that time?

A. That's true sir. I didn't want any money at that time. Still don't want any money.

Q. Am I correct that you have decided that as long as your physical condition remains as it is today, you will neither deserve nor want any money in compensation for that condition; that's true?

A. That's true, sir.

* * *

[105] Q. As you sit here today, are you asking the defendants in this suit to pay for medical screenings?

A. No, sir. I'm not asking anybody to do anything.

Q. In January 1993, when you filed this suit, did you have a need for the defendants to pay for any of your [asbestos] screenings?

A. No, sir.

Q. So far as you know, you weren't asking for any payment for monitoring of your medical condition by the defendants in 1993?

A. No, sir.

[106] Q. In January of 1993; is that correct?

A. Yes, sir, that's correct.